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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AIDS HEALTHCARE FOUNDATION, INC.,

Plaintiffs,

v.

GILEAD SCIENCES, INC., *et. al.*,

Defendants.

Case No: 3:16-cv-00443-WHA
Related Case No. 3:19-cv-02573-EMC

**ADMINISTRATIVE MOTION TO
CONSIDER WHETHER CASES
SHOULD BE RELATED PURSUANT
TO CIVIL L.R. 3-12**

ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED
PURSUANT TO CIVIL L.R. 3-12

Case No. 3:16-CV-00443-WHA / RELATED CASE NO. 3:19-CV-02573-EMC

Defendant Gilead Sciences, Inc. (“Gilead”) respectfully submits this Administrative Motion inviting the Court to consider whether the following cases should be related under Local Rule 3-12: *AIDS Healthcare Foundation, Inc. v. Gilead Sciences, Inc., et al.*, No. 3:16-cv-00443-WHA (N.D. Cal.) (“AHF”) and *Staley, et al. v. Gilead Sciences, Inc., et al.*, No. 3:19-cv-02573-EMC (together with consolidated actions, “*Staley*”). The AHF case is closed, *see AIDS Healthcare Found., Inc. v. Gilead Scis., Inc.*, No. 3:16-cv-00443-WHA, 2016 U.S. Dist. LEXIS 87578 (N.D. Cal. July 6, 2016), *aff’d*, 890 F.3d 986 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 415 (2018), while the *Staley* case was filed in May 2019 and is set for an Initial Case Management Conference on September 5, 2019.

Under Civil Local Rule 3-12(a), “[a]n action is related to another when (1) the actions concern substantially the same parties, property, transaction or event; and (2) it appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different Judges.” A party that believes that an action may be related to another action that “is or was” pending in this District “must promptly file in the lowest-numbered case an Administrative Motion to Consider Whether Cases Should be Related, pursuant to Civil L.R. 7-11.” Civil L.R. 3-12(b). That a case is closed does not relieve a party of its duties under Civil Local Rule 3-12. *Dave Drilling Envtl. En’g, Inc. v. Gamblin*, No. 14-cv-02851-WHO, 2015 U.S. Dist. LEXIS 86919, at *18 (N.D. Cal. July 2, 2015) (“plain language” of Local Rule 3-12(b) requires parties give notice of even closed cases if the case meets the requirements of Local Rule 3-12(a)).

In the course of preparing a motion to dismiss the *Staley* action, undersigned counsel (who was not counsel for Gilead in the AHF action) has recently come to believe that AHF and *Staley* may be related cases within the meaning of Local Rule 3-12(a)(1). When undersigned counsel raised the issue of relatedness in connection with the initial case management conference statement in *Staley*, counsel for the *Staley* plaintiffs expressed the view that the cases are *not* related. Out of an abundance of caution, Gilead now files this Motion and submits the following information to assist the Court in considering whether the AHF and *Staley* actions are related.

The AHF and *Staley* actions may be considered to “concern substantially the same parties,

property, transaction, or event” under Local Rule 3-12(a). In regard to overlap of parties, the plaintiffs in both *AHF* and *Staley* are allegedly purchasers of HIV treatments and the two cases share three defendant corporate groups (Gilead, Japan Tobacco, and Janssen). Further, while the two actions are not identical, there appears to be a substantial overlap in factual allegations and claims. In particular, the two actions appear to contain the following virtually identical allegations—at times using the same characterizations—regarding Gilead’s development and commercialization of tenofovir alafenamide (“TAF”):

- Gilead’s alleged regulatory “manipulation” by allegedly refusing to release TAF as a standalone product for treatment of HIV, instead choosing to first release TAF as part of a combination product. *Compare* Amended Complaint in *AHF*, Ex. A to Ostrander Decl. in Supp. of Admin. Mot. (“*AHF* Compl.”) ¶¶ 12, 16-17, 22, 105-109, *with Staley* Corrected Consolidated Class Action Complaint, Ex B. to Ostrander Decl. in Supp. of Admin. Mot. (“*Staley* Compl.”) ¶¶ 240, 250-251, 290-291.
- Attempts by Gilead and the other defendants to allegedly “game” the regulatory system to protect TAF from generic competition, for instance, by not obtaining an HIV indication for standalone TAF. *Compare AHF* Compl. ¶¶ 20, 102-117, 157-160, *with Staley* Compl. ¶¶ 288-312.
- Gilead’s alleged decision to “shelve” its clinical trials for TAF, in order to obtain a later grant of regulatory exclusivity from the FDA in order to protect TAF from patent challenges. *Compare AHF* Compl. ¶ 8, *with Staley* Compl. ¶ 211.
- Allegations that, by refusing to bring a standalone TAF product to market initially, Gilead intentionally left HIV patients to bear the greater side effects of Gilead’s predecessor product to TAF, tenofovir disoproxil fumarate (“TDF”). *Compare AHF* Compl. ¶¶ 8, 110-117, 123, *with Staley* Compl. ¶ 225, 255.

In addition to the TAF-related factual allegations, the Court may find substantive overlaps between the actions in other respects. For instance, both cases allege that Gilead’s collaborations with Japan Tobacco and Janssen were part of the strategy to protect Gilead’s products from generic competition—indeed, this is the core allegation of the *Staley* complaint—and that the collaborations

1 themselves violated Sections 1 and 2 of the Sherman Act. *Compare AHF* Compl. ¶¶ 161-173, with
 2 *Staley* Compl. ¶¶ 499-505, 514-520. Further, while the *AHF* plaintiffs asserted a claim for
 3 declaratory judgment of invalidity regarding Gilead’s TAF-related patents—a claim that is not in
 4 the *Staley* action—both actions characterize the TAF-related patents as “weak” (*AHF* Compl. ¶¶
 5 11-14, 104-106) or “easily designed around.” *Staley* Compl. ¶¶ 294-304. Both actions also refer
 6 to Gilead’s patent litigation against generic manufacturers regarding TDF, and the existence of
 7 “pay-for-delay settlements with generic manufacturers” (*AHF* Compl. ¶ 42) arising from those
 8 litigations, including the settlement of litigation between Gilead and Teva challenged in the *Staley*
 9 action. *Compare id.* ¶¶ 42 & n.15, 45 with *Staley* Compl. ¶¶ 313-360.

10 Finally, both actions assert violations of Sections 1 and 2 of the Sherman Act, California’s
 11 Cartwright Act, and violation of state unfair competition laws (the *AHF* complaint asserts violation
 12 of California and Nevada unfair competition laws while the *Staley* complaint asserts violation of
 13 the unfair competition and antitrust laws of 36 states). *Compare AHF* Compl. ¶¶ 154-202, with
 14 *Staley* Compl. ¶¶ 439-466, 476-483, 493-543.

15 Local Rule 3-12(a)(1) does not require related cases to contain identical allegations, only
 16 that they be substantially the same. *See, e.g., Our Children’s Earth Found. v. Nat’l Marine*
 17 *Fisheries Serv.*, Nos. 14-cv-1130 SC, 14-4365 SC, 2015 U.S. Dist. LEXIS 94997, at *38 (N.D. Cal.
 18 July 20, 2015) (relating cases involving “substantially the same matter” despite “slightly differing
 19 parties” and “a differing underlying FOIA request”); *In re Leapfrog Enters., Inc. Sec. Litig.*, No.
 20 03-cv-5421 RMW, 2005 U.S. Dist. LEXIS 44899, at *3-6 (N.D. Cal. July 5, 2005) (relating cases
 21 involving different plaintiffs that “name the same defendants, make similar factual allegations, and
 22 seek redress for violation of the same sections of the Securities and Exchange Act”); *Pepper v.*
 23 *Apple*, No. 11-cv-06714-YGR, 2019 U.S. Dist. LEXIS 143264, at *5-7 (N.D. Cal. Aug. 22, 2019)
 24 (relating cases involving different plaintiffs and business relationships with defendant where the
 25 cases stemmed from same “economic structures”). The *AHF* and *Staley* actions may meet that
 26 standard with regard to the overlapping allegations and claims described above.

27 Relating these cases may also be considered to avoid “an unduly burdensome duplication
 28 of labor and expense or conflicting results if the cases are conducted before different Judges” under

Civil Local Rule 3-12(a)(2). The Court in *AHF* already analyzed and considered the TAF-related allegations and other allegations and claims common to both actions. *See AHF*, No. 3:16-cv-00443, 2016 U.S. Dist. LEXIS 87578, at *23 (holding that Gilead, like any other company, is entitled to bring its improved products to market ““whenever and however it chooses””) (quoting *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 545 (9th Cir. 1983)). Given the time and effort that the Court has already expended, relating *AHF* and *Staley* may potentially conserve judicial resources. *See, e.g., Pepper*, 2019 U.S. Dist. LEXIS 143264, at *7 (relation of cases appropriate to avoid “unnecessary duplication of *judicial* effort and resources”) (emphasis in original).

Because *AHF* and *Staley* may be considered to contain substantively similar allegations and claims, and because relating the cases may conserve judicial resources, Gilead respectfully invites the Court to consider relating the two cases.

Dated: August 30, 2019

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